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80-1814

No. .....

In the Supreme Court of the United States

October Term, 1980

CITY OF CINCINNATI,
Petitioner,

vs.

ALAN R. JONES, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTIONS PRESENTED

1. Whether it is a denial of due process of law when a party to an action is not given notice of the filing of a judgment entry.
2. Whether it is a denial of due process of law when a court fails to follow the local rules of the court.
3. Whether it is a denial of due process of law when a court fails to notify the parties or their attorneys that the court has prepared and placed its own judgment entry of record.
4. Whether it is a denial of due process of law for a court to fail to specify that an Entry prepared by the Court itself is a Judgment Entry when notifying the parties or their attorneys of such Entry.

LIST OF PARTIES

Petitioner:

CITY OF CINCINNATI

Respondents:

ALAN R. JONES, GILBERT FLICK, STEVE WONG, DEAN M. WARD and GUY T. ENGELBERT

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No. .....

In the Supreme Court of the United States

October Term, 1980

CITY OF CINCINNATI,
Petitioner,

vs.

ALAN R. JONES, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Ohio

The petitioner, City of Cincinnati, respectfully prays that a writ of certiorari issue to review the denial of the Motion for an Order Directing the Court of Appeals for Hamilton County to Certify its Record and dismissal of the appeal to the Supreme Court of Ohio entered in this proceeding on January 30, 1981.

OPINIONS BELOW

The dismissal of the Supreme Court of Ohio, the entry overruling the motion for an order directing the Court of Appeals for Hamilton County to certify its record by the Supreme Court of Ohio, the entry of dismissal by the Court of Appeals for Hamilton County, the memorandum opinion of the Court of Common Pleas and the judgment entry of the Court of Common Pleas appears in the appendix hereto.

JURISDICTION

The Supreme Court of Ohio overruled the City of Cincinnati's Motion for an Order Directing the Court of Appeals for Hamilton County to Certify its record and sua sponte dismissed the appeal on January 30, 1981. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Rules of Civil Procedure Rule 54(A), Judgments; Costs:

> "(A) Definition; form. 'Judgment' as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a referee or the record of prior proceedings."

Ohio Rules of Civil Procedure Rule 58, Entry of Judgment:

"Subject to the provisions of Rule 54(B), upon a general verdict of a jury, or upon a decision announced, the court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall thereupon enter it. A judgment is effective only when filed with the clerk for journalization. Entry of the judgment shall not be delayed for the taxing of costs.

Amended July 1, 1971."

Ohio Rules of Civil Procedure Rule 60(B), Relief from Judgment or Order:

"(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules."

Rules of the Court of Common Pleas, Hamilton County, Rule 17(A), Journal Entries:

"(A) Unless the Court otherwise directs, counsel for the party in whose favor an order, judgment, or decree has been granted in a civil case, shall prepare a proper journal entry within ten days thereafter unless the time be extended by the Court and submit the same to counsel of the opposite party, who shall approve or reject the same within three days after its receipt by him. In case of rejection opposing counsel may file objections thereto in writing with the Court.

The judgment entry specified in Civil Rule 58 shall be journalized by the Clerk of Courts on the same day of the verdict decree or decision. If such entry is not prepared and presented for journalization by counsel then it shall be prepared and journalized by the Court.

The Court shall approve a journal entry deemed by it to be proper, sign the same and cause it to be filed with the Clerk of Courts. Notice of the filing of each journal entry for the journalization shall on the following day of such filing be published in the Cincinnati Court Index."

Ohio Rules of Appellate Procedure, Rule 4(A), Appeal as of Right—When Taken.

"(A) Appeals in civil cases. In a civil case the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed

from. A notice of appeal filed before entry of such judgment or order shall be treated as filed after such entry and on the day thereof. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is suspended as to all parties by a timely motion filed in the trial court by any party pursuant to the Civil Rules hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of the last of any of the following orders made upon a timely motion under such rules granting or denying a motion (1) for judgment under Rule 50(B); (2) for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is filed with the clerk of the trial court for journalization."

STATEMENT OF THE CASE

The respondents, police cadets Alan R. Jones, Gilbert Flick, Steven Wong, Dean M. Ward, and Guy T. Engelbert, filed a Complaint in Common Pleas Court alleging among other claims breach of contract by the petitioner, City of Cincinnati. The respondents claimed that they were entitled to additional compensation from the city. The City of Cincinnati denied that the respondent police cadets were entitled to additional compensation for the time worked since the respondents were permanent full-time civil service employees (40 hours per week plus fringe benefits)

who had been paid for 40 hours per week for 52 weeks including vacation, sick leave, overtime and shift differential.

After numerous reports and trial settings this case came on for trial on October 11, 1979. The case was tried to the court which lasted about three hours. After the completion of the trial the visiting judge requested post trial briefs by October 13, 1979 and took the matter under submission.

On October 26, 1979, the court entered judgment against the petitioner and placed an Entry of record granting judgment to the respondent police cadets without notice to the attorneys for the petitioner or respondents or their representatives. On January 15, 1980, counsel for the respondents and the petitioner learned of the Entry, fifty days after the Notice of Appeal was required to be filed.

A Motion for Relief from Judgment, Rule 60(B) was filed and denied by the trial court. Two notices of appeal were filed with the Court of Appeals for the First Appellate District of Ohio, one, for the October 26, 1979 Entry and the second, for the denial of the Motion for Relief from Judgment.

The First Appellate District for Ohio dismissed the appeal for the October 26, 1979 Entry, and a Motion for an Order Directing the Court of Appeals for Hamilton County to Certify its Record was filed with the Supreme Court of Ohio.

On January 30, 1981 the Supreme Court of Ohio overruled the Motion to Certify and sua sponte dismissed the appeal. It is from this dismissal that this Petition for a Writ of Certiorari is sought.

REASONS FOR GRANTING THE WRIT

1. Due Process of Law Should Be Extended to Include Notice of a Judgment Entry Which Affects Appellate Rights.

Ohio courts adhere to the principle that there is no right for a party to be given notice of the filing of a judgment entry. The current law in Ohio is:

> "There is no requirement under the Ohio Rules of Civil Procedure to give a party to an action notice of the filing of the judgment entry and such a failure does not deny him due process of law." *Centers, Inc. v. Abraham,* 46 Ohio App. 2d 262, 348 N.E.2d 741 (1975).

This is consistent with a prevailing view in Ohio, "The right of appeal is not an essential constituent of due process of law." *Fawick Airflex Co. v. United Electrical R. & M. W.*, 56 Ohio L. Abs. 65, 90 N.E.2d 610 (1950); 17 O. JUR. 3d 215, *Constitutional Law,* Section 678. The same general principle, "An appellate review in civil cases is not an essential requirement of due process of law in the absence of constitutional or statutory provisions to the contrary" seems to be the prevailing law in this country. 16A CORPUS JURIS SECUNDUM 844, *Constitutional Law,* Section 626.

Although it is not a denial of due process when a court fails to give a party notice of a judgment entry, Rule 4(A) of the Ohio Rules of Appellate Procedure and Ohio case law hold in spite of lack of notice failure to file a notice of appeal within thirty days of such judgment entry is a jurisdictional defect. The result—Ohio appellate courts sua sponte dismiss the appeal as a matter of law.

Recently the Court of Appeals for the Ninth Judicial District of Ohio acknowledged that neither the appellant

nor the appellee received notice of the trial court's decision granting a motion for summary judgment, a final appealable order, and noted in dismissing the appeal that this is a recurring problem which should be addressed by the Supreme Court of Ohio. *Walsh v. Ford Motor Company,* C.A. No. 3054, November 5, 1980. (Copy attached.) On February 26, 1981 the Supreme Court of Ohio refused to grant certiorari and sua sponte dismissed the appeal.

The Supreme Court of the United States in an opinion written by Mr. Justice Brandeis suggested that "Entry of judgment without notice may be a denial of due process, even where there is jurisdiction over the person and subject matter." *American Surety Company v. Baldwin,* 287 U.S. 156, 168 (1932). Although the Supreme Court extended the Fourteenth Amendment "due process of law" provisions in *Mullane v. Central Hanover Bank & Trust Co., et al.,* 339 U.S. 306 (1950), the court has not to date extended nor formalized Justice Brandeis' suggestion—Entry of judgment without notice is a denial of due process of law. It is time to extend due process of law to include notice of a judgment entry.

2. Notice of a Decision Is As Essential to Due Process As Notice of a Proceeding and Opportunity to Be Heard.

In Ohio the courts have provided appropriate safeguards for persons in regard to due process rights of notice and opportunity to be heard. The Ohio courts have even extended this right of notice and opportunity to be heard to churches when expelling members. *Randolph v. First Baptist Church of Lockland,* 68 Ohio L. Abs. 100, 120 N.E.2d 485 (1954). However, Ohio law does not require that notice be given of the decision. It might be said, What does it profit a man to gain the whole world of

due process rights of notice and opportunity to be heard, only to lose his right to appeal through lack of notice of an adverse decision not protected by due process of law?

In this action the City of Cincinnati filed an Answer, appeared in court on numerous occasions, attended depositions, and participated in all parts of the litigation including trial and post trial briefs, but never received nor did the court send any notice of the decision or judgment entry filed by the judge himself. As a result the City of Cincinnati lost all rights of appeal. Rule 4(A) of the Ohio Appellate Rules provides that an appeal must be perfected within thirty days of the filing of the judgment entry or the appellate court lacks jurisdiction to hear the appeal. Despite the City of Cincinnati's diligent and vigorous defense of the action, the decision became "Appeal Proof" by the court failing to provide any communication or notice to either party or their attorneys in this action.

The City of Cincinnati submits that Ohio courts will continue to decree "Appeal Proof" decisions unless there is a recognition by the Supreme Court of the United States that notice of a decision is as essential to due process as notice of a proceeding and opportunity to be heard.

CONCLUSION

Over the years the courts have expanded due process rights to all walks of life. With the expansion of rights to notice and opportunity to be heard came expanded justice and fair play to many who otherwise would have been denied such rights. Now, the time has come to likewise expand the rights to notice of decisions including judgment entries and final appealable orders of courts

and expand justice and fair play to those who use the courts to redress their differences.

Respectfully submitted,

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APPENDIX

ORDER OF THE SUPREME COURT OF OHIO DISMISSING THE APPEAL

(Dated January 30, 1981)

No. 80-1699

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

ALAN R. JONES, *et al.*,
Appellees,

VS.

CITY OF CINCINNATI, *et al.*,
Appellants.

APPEAL FROM THE COURT OF APPEALS
FOR HAMILTON COUNTY

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY THE RECORD

(Dated January 30, 1981)

No. 80-1699

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

ALAN R. JONES, *et al.*,
Appellees,

VS.

CITY OF CINCINNATI, *et al.*,
Appellants.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS
FOR HAMILTON COUNTY
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

ENTRY OF DISMISSAL OF THE COURT OF APPEALS

(Filed October 16, 1980)

No. C-800622

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ALAN R. JONES, *et al.*,
Appellees,

vs.

CITY OF CINCINNATI, *et al.*,
Appellants.

ENTRY OF DISMISSAL

This cause came on to be heard by the Court upon the motion of the appellee for an Order of this Court dismissing the appeal and upon the memorandum in opposition thereto, and

The Court, being fully advised in the premises, finds that said motion is well taken and the same ought to be, and hereby is, granted.

WHEREFORE, it is Ordered and Decreed that the appeal is dismissed.

It is further Ordered that a certified copy of this judgment shall constitute the mandate to the Court of Common Pleas of Hamilton County, Ohio, pursuant to Rule 27, Ohio Rules of Appellate Procedure.

ENTRY AND FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE COURT OF COMMON PLEAS

(Entered October 26, 1979)

Case No. A-760 8395

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ALAN R. JONES, *et al.*,
Plaintiffs,

vs.

CITY OF CINCINNATI, *et al.*,
Defendants.

This cause comes on to be heard upon the merits and the Court having heard the evidence, arguments of counsel and having considered the law, enters now its finding of fact and conclusions of law as follows:

FINDINGS OF FACT

1. There was a contract of employment between the Plaintiffs and said Defendant City.

2. The City breached that contract.

3. Plaintiffs suffered damage by such breach in the following respective amounts.

As to Plaintiffs Engelbert, Ward and Jones $6,970.78

As to Plaintiff Flick $8,999.80

As to Plaintiff Wong $7,840.36

CONCLUSIONS OF LAW

1. There was a contract of employment between the parties.

2. Defendant City breached that contract.

3. Plaintiffs are entitled to recover.

Judgment is hereby granted to the Plaintiffs in the amounts set forth individually above.

Costs taxed at ..... are assessed against Defendant. To all of the foregoing Defendant excepts.

Enter this 26 day of October, 1979.

/s/ PAUL E. RILEY
Paul E. Riley, *Judge*
by assignment

OPINION OF THE COURT OF COMMON PLEAS

(Entered October 26, 1979)

Case No. A-760 8395

IN THE COURT OF COMMON PLEAS,
HAMILTON COUNTY, OHIO

ALAN R. JONES, *et al.*,
Plaintiffs,

vs.

CITY OF CINCINNATI, *et al.*,
Defendants.

MEMORANDUM OPINION

FACTS

The facts in this case are not generally disputed and are basically as follows:

On August 19, 1973, the five individual Plaintiffs began employment with the City of Cincinnati, Police Division.

They were all engaged in a work/school cycled program wherein they were for one half of the year doing clerical work for the Police Division, and the remaining six (6) months were enrolled at the University of Cincinnati, Police Science Program, working toward the requirements for an associate degree in Police Science.

They were all advised that this work/school cycle would last for a period of three (3) years, after which time they would become Police Officers of the city.

As cadets, Plaintiffs were compensated at the rate of $3,480.00 per annum. They continued in the work/school program until January 1974 when Defendant Flick completed his required schooling, then Wong completed his requirements March 26, 1975, and Engelbert, Jones and Ward completed their requirements June 1, 1975.

They had each completed the necessary credit hours at the University of Cincinnati to attain their associate degrees.

They all graduated prematurely to the rest of their class because they all had previous college credits that were transferable and acceptable toward the associate degree.

When they began their training they all had executed the paper entitled, "Affirmation of Police Cadets Applicants, Conditions of Employment."

The pertinent portion thereof read as follows: ". . . I shall continue in alternating college and work terms until the completion of a three year program."

All five Plaintiffs had advised their supervisors in the Police Division that they would be completing their studies ahead of the rest of their class.

The administration section studied and investigated the problems presented by the premature completion of Plaintiffs' schooling at the University of Cincinnati and various analyses and recommendations were examined and studied by capable police administrators.

There was some consideration of the enrollment of the Plaintiffs directly into the Sixty-first Recruit Class which began in May 1975, at recruit pay which was more than double cadet pay.

Some consideration was given to permitting them to continue in the University of Cincinnati in a program designed for the bachelors degree while the balance of their class continued in the work/study program.

Unfortunately, no agreement was ever formulated and the Plaintiffs were compelled to do a double work schedule. All had requested entry into the Sixty-first Recruit Class, but their requests were denied. They continued in a double work program at cadet pay.

The administrative section agrees that most of the problems created by this transfer of credits arose because of poor communication.

It is interesting to note by Exhibit 21, that the "Affirmation of Cadet—Conditions of Employment" were modified effective January 1976.

ARGUMENTS

It is Plaintiffs' position that they signed what amounted to a contract of employment which provided for a three year program of work/study.

Plaintiffs contend that Defendant City has breached this contract and the measure of their damages is the economic loss incurred by them by being compelled to work double the time of their fellow cadets at cadet pay.

Defendant's position is that they were hired at a specific salary as police cadets, that their premature completion of the requirements for the associate degree is of no consequence and that they were paid for what they did whether they were in school or working double time at cadet salary.

Defendant says there was no contract, therefore no breach. The salary had been established by council for the program and Plaintiffs were paid that salary.

DECISION

One question the Court wishes to put to rest early in this decision and that is the contention by the city that Section 5705.41 (d) Ohio Revised Code applies here to prevent Plaintiffs from recovery because no certificate was attached thereto by the fiscal officer of the City certifying the amount has been appropriated for such purpose, etc.

Section 5705.41 (d) has no application here. Clearly, this Section by its own language excludes from such certification the payrolls of regular employees and officers.

Therefore, it is the opinion of the Court that Defendants reliance upon that section in this instance is misplaced and incorrect.

Further, the Court is of the opinion that there was a contract of employment between the parties and that this contract was breached by the City.

Further, it is the decision of the Court that the measure of their damages is the value of the amount of extra time spent in work while the rest of their class was taking schooling.

This represents an economic loss and the Defendant City could have solved the problem by simply giving them that time off.

Therefore, the following amounts representing damages are awarded to each individual as follows:

1. As to Plaintiffs Engelbert, Ward and Jones at cadet pay ..... $ 6,970.78 each
2. As to Plaintiff Flick at cadet pay 8,999.80
3. As to Plaintiff Wong at cadet pay 7,840.36

Total Damages $23,810.94

The defendants may at its option pay the assessed damages or grant plaintiffs' compensatory time.

Costs are assessed to Defendants.

The Court will place its own entry of record this date.

/s/ PAUL E. RILEY
Paul E. Riley, *Judge*
by assignment

DECISION OF THE COURT OF APPEALS OF NINTH JUDICIAL DISTRICT OF OHIO IN WALSH V. FORD MOTOR COMPANY, ET AL.

(Dated November 5, 1980)

C.A. No. 3054

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO)
) SS:
LORAIN COUNTY)

ROBERT F. WALSH,
Plaintiff-Appellant

v.

FORD MOTOR COMPANY, *et al.*,
Defendant-Appellees

APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT, LORAIN COUNTY, OHIO, CASE NO. 83258-78

DECISION AND JOURNAL ENTRY

This cause was heard October 23, 1980, upon the record in the trial court and the briefs. It was argued by counsel

for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

PER CURIAM

This appeal is from the denial of a Civ. R. 60(B) motion to vacate a judgment entered on appellee Ford's motion for summary judgment. We affirm.

On November 5, 1979, the trial court took Ford's motions for summary judgment under advisement. On November 29, the court filed its entry granting the judgment. Appellant Walsh's counsel denies ever receiving a copy of the entry. He learned of the decision shortly before filing the Civ. R. 60(B) motion to vacate on March 12, 1980. The basis of the motion was that neither the appellant or the appellees, nor their representatives had received any notice of the court's November 29, decision.

The issue raised by the appellant is a recurring one which perhaps should be addressed by the supreme court in the court rules. However, under the present state of the court rules, the only purpose of appellant's Civ. R. 60(B) motion would be to circumvent the 30 day appellate period under App. R. 4(A). See *Bosco v. City of Euclid*, 38 Ohio App. 2d 40 (1974).

Accordingly, the first assignment of error is overruled and the judgment affirmed. The second assignment of error is not properly before the court.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the Lorain County Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy

of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

/s/ (Illegible)
Presiding Judge for the Court

BELL, *P. J.*
VICTOR, *J.*
MAHONEY, *J.*, concur